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Supreme Court, U.S.
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No. 86-1302

IN THE —

SUPREME COURT OF THE UNITED STATES

October Term, 1986

MORRIS THIGPEN, Commissioner, Mississippi Department of Corrections, EDDIE LUCAS, Warden, Mississippi State Penitentiary and STATE OF MISSISSIPPI

Petitioners,

vs.

MARION ALBERT PRUETT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari in this case when it has just denied certiorari on the identical question presented here in Thigpen v. Wheat, U.S. S.Ct. No. 86-1032, 55 U.S.L.W. 3637 (March 23, 1987)?

2. Whether this Court should grant certiorari when the contentions put forward by the state were not raised in the state courts or the District Court and were put forward for the first time in the State's reply brief at the Court of Appeals?

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No. 86-1302

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

MORRIS THIGPEN, et al.,

Petitioners,

vs.

MARION ALBERT PRUETT,

Respondent.

Brief in Opposition
to petition for a Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

Respondent, Marion Albert Pruett, respectfully prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

STATEMENT OF THE CASE

The Commissioner of the Mississippi Department of Corrections and others [hereinafter "the State"] seek review by this Court of an unpublished decision of the Court of Appeals for the Fifth Circuit affirming an order of the United States District Court for the Northern District of Mississippi, granting habeas corpus relief to Marion Albert Pruett.

The State presented a single question to the Court of Appeals in its opening brief: whether a recently adopted procedural rule constituted an adequate and independent state ground to preclude federal review of the constitutional issues presented by Mr. Pruett. Before deciding this case, the Court of Appeals concluded in another case that it did not. Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986), cert. denied, ___ U.S. ___, 55 U.S.L.W. 3637 (1987). This case involves the same procedural rule as Wheat. The Court of Appeals found this case fully controlled by Wheat.

The State sought certiorari in Wheat, presenting the same

question to this Court that it now presents in this case.[1] The petition was denied on March 23, 1987. Thigpen v. Wheat, U.S. S.Ct. No. 86-1032, 55 U.S.L.W. 3637 (March 23, 1987).

Mr. Pruett was convicted of capital murder and sentenced to death in 1982 by a Mississippi court for a homicide that occurred in Alabama on September 17, 1981. The decedent was abducted from a savings and loan association office in Jackson, Mississippi on that date, and transported to Sumter County, Alabama, where she was fatally shot.

During jury selection, both the prosecution and the defense moved that one prospective juror, Ronald Smith, be stricken for cause due to his bias against Mr. Pruett. R. 586-87, 616. However, the court refused to excuse the juror, who was among those who decided Mr. Pruett's guilt and sentence. Both the District Court and the Court of Appeals concluded that the refusal to excuse the juror denied Mr. Pruett's rights under the Sixth Amendment.

The trial was conducted in a highly emotional atmosphere in which the spectators openly wept before the jury and applauded the announcement of the verdict of guilty and the sentence of death. R. 1006, 1112. The prosecutor contributed to the situation by introducing a picture of the victim's decomposed body which was found some forty days after she was killed, R. 857-860; presenting evidence of other criminal charges, unrelated to the charges before the court, R. 729, 765, 734-35, 778, 787, 794, 800, 928, 958, 963; and concluding both phases of the trial with highly inflammatory closing arguments, R. 1001-1005, 1074-1080, 1097-1110. The jury found Mr. Pruett guilty of capital murder on April 8, 1982, and sentenced him to death the same day.

The Mississippi Supreme Court affirmed. Pruett v. State, 431 So.2d 1101 (Miss. 1983), cert. denied, 464 U.S. 865 (1983).

Mr. Pruett sought leave to file a writ of error coram nobis in the Mississippi Supreme Court. The Court refused to grant

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1. See Petition for a Writ of Certiorari in Wheat, No. 86-1032 at i.

leave and denied relief, declining to review a number of claims based upon a procedural rule it had recently announced in Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983). Pruett v. Thigpen, 444 So.2d 819 (Miss. 1984).

REASONS FOR DENYING THE WRIT

The Petition for A Writ of Certiorari herein presents two questions. This Court has already denied review of the first question when it was presented in an identical manner in Thigpen v. Wheat, U.S. S.Ct. No. 86-1032, 55 U.S.L.W. 3637 (March 23, 1987). The second question was not properly raised in the courts below and, therefore, should not be reviewed by this Court.

Moreover, the decision below does not involve any substantial question of federal law which has not been settled by this Court, or a conflict between decisions of other courts or this Court. This case therefore fails to satisfy any of the considerations governing review on certiorari set out in Rule 17 of the Rules of this Court.

I. THE APPLICATION OF ITS DECISION IN WHEAT v. THIGPEN TO THIS CASE BY THE COURT OF APPEALS PRESENTS NO QUESTION WORTHY OF RESOLUTION BY THIS COURT.

The first question and argument contained in the Petition for Certiorari herein are virtually identical to those presented to this Court in Thigpen v. Wheat, No. 86-1032.[2] Indeed, the question and heading to the first argument, taken verbatim from Wheat, indicate that this case involves improper closing argument,[3] which was the issue in Wheat, but is not involved in this case. This Court denied the petition in Wheat. 55 U.S.L.W. 3637. There is no reason to reach a different result here. The Court of Appeals relied entirely upon Wheat in reaching the same

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2. The question presented is exactly the same. Compare Petition for a Writ of Certiorari in Wheat at i, with Petition herein at i. Pages 11-53 of the Petition for Certiorari herein are identical to pages 10-53 of the Petition in Wheat, except that a few references to Wheat have been added to the Petition in this case.

3. See Petition for a Writ of Certiorari in Wheat at i, 10; Petition for a Writ of Certiorari herein at i, 11.

conclusion in this case. Therefore, the petition in this case should be denied as well.

In Wheat v. Thigpen, the Court of Appeals for the Fifth Circuit found that Mississippi had departed from its long-standing practice of reviewing claims raised for the first time in applications for post-conviction relief. 793 F.2d at 627-627. The Mississippi Supreme Court announced in Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983), that it would no longer consider such claims and immediately applied the rule by declining to consider several of Wheat's claims. The Fifth Circuit concluded that because it had not been previously announced or followed, the newly-adopted procedural rule did not constitute an adequate and independent state ground that prevents vindication of constitutional violations in the federal courts. Wheat v. Thigpen, 793 F.2d at 627.

It is well established that a state court's decision that a claim was forfeited in state court may be deemed to be independent and adequate state law grounds and prevent federal court review. However, as the Court of Appeals observed in Wheat, 793 F.2d at 624, there is an exception which is applicable here. Federal courts will not recognize a procedural forfeiture unless the state court relied on procedural rules and requirements which were clearly announced to the defendant and his counsel and regularly followed at the time of his trial or appeal. Henry v. Mississippi, 379 U.S. 443, 448 n. 3 (1965); James v. Kentucky, ___ U.S. ___, 104 S.Ct. 1830, 1835, 80 L.Ed.2d 346, 353 (1984) (only state procedural rules which are "firmly established and regularly followed . . . can prevent implementation of federal constitutional rights"). In addition, to be valid, the procedural bar must be fairly applied to all litigants. Hathorn v. Lavorn, 457 U.S. 255 (1982); Barr v. City of Columbia, 378 U.S. 146 (1964).

Because such procedural defaults-"prevent implementation of a federal right[,] . . . the question of how and when defaults in compliance with state procedural law rules can preclude [the]

consideration of a federal questions is itself a federal question." Henry v. Mississippi, 379 U.S. at 447.

Thus, the Court of Appeals was required to determine whether the procedural rule announced in Wheat was clearly announced to litigants and their counsel and fairly and consistently applied. Such an analysis is consistent with the analysis used by all other federal courts that have addressed the issue. See, e.g., Spencer v. Zant, 781 F.2d 1458 (11th Cir. 1986)(en banc) (court is not precluded from reviewing claim by state procedural bar which was retroactively applied); Granviel v. Estelle, 655 F.2d 673, 679 (5th Cir. 1981), cert. denied, 455 U.S. 1003 (1982) ("We cannot enforce against Granviel a contemporaneous objection rule that apparently did not even exist at the time of his trial"); Lumpkin v. Ricketts, 551 F.2d 680, 682 n. 2 (5th Cir. 1977), cert. denied, 434 U.S. 957 (1977) (applying state law in effect at time of trial); Freeman v. Georgia, 599 F.2d 65, 71 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) (rejecting state finding of procedural waiver where the court did not cite specific rule which was violated); Maxwell v. Sumner, 673 F.2d 1031, 1034 (9th Cir. 1982), cert. denied, 459 U.S. 976 (1982) (examining state's claim of procedural bar, and finding no such procedural rule).

In Wheat, the Court of Appeals surveyed the law of a state within its circuit and found that "[i]n the years immediately preceding Wheat's appeal the Mississippi Supreme Court routinely reviewed claims made for the first time on writ of error coram nobis." 793 F.2d at 625.[4] This Court customarily defers to courts of appeals on questions of state law, and the state courts' use of procedural bars. Rummel v. Estelle, 445 U.S. 243, 267, n. 7 (1980).

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4. Although now asserting that this was not the case, the State has acknowledged in its pleadings that during this time the Mississippi Supreme Court "considered with few exceptions all claims" presented in a post-conviction petition. State's "Response to Application for Leave to File a Petition for Writ of Error Coram Nobis and/or Writ of Habeas Corpus" filed in Edwards v. Thigpen, introduced as an exhibit in the District Court below, at 22 [emphasis added].

The Court's conclusion is borne out by a review of the decisions in which the Mississippi Supreme Court routinely ruled on the merits of all claims raised by death-sentenced inmates for the first time in petitions for writs of error coram nobis.[5] See, e.g., Bell v. Watkins, 381 So.2d 118 (Miss. 1980); In re Jordan, 390 So.2d 584 (Miss. 1980). In Bell, the Court "carefully and meticulously considered each allegation" on the merits, including seventeen claims which were raised for the first time on coram nobis. 381 So.2d at 119. Similarly, in Jordan, where the petitioner raised three new claims on coram nobis, the Court discussed the issues at some length before denying them on the merits. See also, e.g., Culberson v. State, 412 So.2d 1184 (Miss. 1982) (court reaches merits of claims in coram nobis); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), rehearing denied with opinion, 685 F.2d 139 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983) (court finds Mississippi Court ruled on merits of claims).

Indeed, it was because the Mississippi Supreme Court was addressing the merits of claims on coram nobis that the Attorney General petitioned it to abandon its "no holds barred" approach.[6]

The Mississippi Supreme Court also recognized issues presented for the first time on coram nobis review in noncapital cases. Relying upon a Mississippi law which codified and ex-

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5. At the time of the petitions for post-conviction relief in both Wheat and Pruett, the accepted procedure was to file an application for a writ of error coram nobis. Edwards v. Thigpen, 433 So.2d 906, 907 n.1 (Miss. 1983).

6. See the State's response in Edwards v. Thigpen, quoted at some length by the Court of Appeals in Wheat, 793 F.2d 626, n. 5, in which the State asked the Mississippi court to cease it practice of reviewing all constitutional violations in order to avoid a "Crash Upon the Rocky Shores of the Federal Judiciary." The State also confessed in its brief to the Court of Appeals that "[t]he strategy of the state in the early days of capital litigation was to meet everything on the merits," but that it changed its strategy to rely instead on procedural defaults. The State overlooks the fact that this shift in strategy, without notice to the litigants, resulted in the unannounced application of the rule which will not be recognized by the federal courts as a legitimate bar. As stated by the Court of Appeals in Wheat, "The State should not be concerned with eliminating a defendant's chance to raise constitutional claims without first telling the defendant when he must raise his claims or else waive them." Id. at 626, n. 5.

panded the use of the writ, the court held that coram nobis was available for the presentation of newly discovered evidence which went to the "merits" of the trial. Lang v. State, 230 Miss. 147, 92 So.2d 670 (1957).

Later in In re Broom's Petition, 251 Miss. 25, 168 So.2d 44, 47-48 (1964), the court expressly recognized that the writ was available for claims asserting "the right to a new trial upon the ground that the sentence was imposed in violation of the Constitution". Since Broom, the court has reaffirmed that the writ is available for claims asserting constitutional violations.[7]

Thus, as found by the Court in Wheat, the Mississippi Supreme Court had consistently considered the merits of claims asserted in such applications. Then, in a trilogy of cases, the Mississippi Supreme Court announced a new policy of refusing to consider claims asserted for the first time on coram nobis in capital cases. Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983); Smith v. State, 434 So.2d 212 (Miss. 1983). A majority of the Court reiterated that it would not review new claims in two later cases, Evans v. State, 441 So.2d 520 (Miss. 1983) and King v. Thigpen, 441 So.2d 1365 (Miss. 1983). Three dissenting justices observed that the new policy was a departure from its treatment of similar claims in previous cases in which "this Court has repeatedly allowed presentation of constitutional issues which could have been litigated at trial or on direct appeal but for various reasons were not." Evans, 441 So.2d at 525 (Robertson, J.,

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7. See, e.g., Phillips v. State, 421 So.2d 476, 483 (Miss. 1982) (coram nobis available for a "collateral attack based upon constitutional defects . . ."); Nelson v. Tullos, 323 So.2d 539, 543 (Miss. 1975) ("In this jurisdiction relief for a defendant who claims to have been convicted as the result of a deprivation of his constitutional rights is by writ of error coram nobis"); Botts v. State, 210 So.2d 777, 779 (Miss. 1968) ("the violation of the constitutional right . . . to counsel constitutes ground for granting a writ of error coram nobis"); Fondren v. State, 199 So.2d 625 (Miss. 1967) (post-conviction relief granted for constitutional claim of exclusion of Blacks from juries); Windom v. State, 192 So.2d 689, 691 (Miss. 1966), ("This Court has provided a plain, adequate and speedy post-conviction remedy for adjudication of all issues that may be raised under the United States . . . Constitution").

dissenting).

The new rule announced by the Mississippi Supreme Court in Wheat, Edwards and Smith was applied to Mr. Pruett's case just a few months later. The rule had not been announced or applied at the time of Mr. Pruett's trial or his direct appeal. The Court of Appeals for the Fifth Circuit found the issue clearly governed by its Wheat decision:

> As in Wheat, Pruett completed his direct appeal before the Mississippi Supreme Court announced its new procedural rule. This circuit's decision in Wheat controls the procedural issue in this case.

Pruett v. Thigpen, Appendix to Petition for Certiorari herein [hereinafter "App."] at A7.

Wheat v. Thigpen, 793 F.2d 621, is the case in which this issue was analyzed and decided by the Court of Appeals for the Fifth Circuit. This Court denied certiorari in Wheat. There is no reason that certiorari should be granted in this case.

II. THE SECOND ISSUE PRESENTED BY THE STATE WAS NOT PROPERLY RAISED IN THE COURTS BELOW AND DOES NOT PRESENT AN IMPORTANT QUESTION WORTHY OF PLENARY CONSIDERATION BY THIS COURT.

Both the District Court and the Court of Appeals concluded that the trial court's refusal to grant a challenge for cause of a juror who indicated his bias against Mr. Pruett violated the Sixth Amendment. The State seeks review of the decision below on the basis of grounds not properly presented in the lower courts.

The State asserts that even though the defense objected once and tried to object a second time and the prosecution moved to strike the juror for cause, there was a procedural default at trial because there was not a third objection to the juror by the defense. State's Petition for Certiorari at 54-60. The State also asserts that Mr. Pruett is not entitled to relief because a peremptory challenge was not used against the juror even though Pruett exhausted all of his peremptory challenges. Id. at 60-64. These assertions were not raised in the state courts, the District Court, or in the State's opening brief in the Court of

Appeals below.[8] It was not until the State's reply brief in the Fifth Circuit that these contentions were put forward for the first time.

The Court of Appeals below rejected the State's assertion that a third objection was required:

> Counsel preserves an issue by bringing it clearly to the trial court's attention and getting a positive ruling. It certainly was not necessary to repeat an objection that had been made by both sides and directly denied by the court.

Pruett v. Thigpen, App. at A14.

The District Court raised the peremptory challenge consideration sua sponte and found that the state court had not relied upon it and the state had not asserted it. Thus, it found the issue waived. District Court Memorandum Opinion of March 21, 1986 at 17, D.Ct. R. at 153, Appendix to Petition for Writ of Certiorari herein at A48-A51 17, relying upon Washington v. Watkins, 655 F.2d 1346, 1348 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982), and Wiggins v. Procunier, 753 F.2d 1318 (5th Cir. 1985). The Court of Appeals reached the same conclusion. App. at A15.

It is of course well established that a litigant may not raise new issues for the first time its reply to the arguments made by an appellee on the issue presented in the appellant's opening brief. United States v. Birdsell, 775 F.2d 645, 655, n. 4 (5th Cir. 1985); Knighten v. Commissioner of Internal Revenue, 702 F.2d 59, 60 n. 1 (5th Cir. 1983), cert. denied, 464 U.S. 897 (1983), citing Ellingson v. Burlington Northern, Inc., 653 F.2d 1327, 1332 (9th Cir. 1981), 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3974 at 428 (1977),

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8. In state post-conviction proceedings, the State asserted only that in not assigning the error on direct appeal, Mr. Pruett accepted the trial court's determination of the matter. State's Response to Application for Leave to File a Petition for a Writ of Habeas Corpus at 21. The same assertion was made in two briefs to the District Court. Brief in Support of Respondent's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, filed on or about March 3, 1984, at 45-46; Memorandum Brief, filed on or about March 6, 1985, at Argument C (pages are not numbered). No assertion of any default at trial was made in any of the three briefs. The issue was not mentioned in the State's opening brief to the Fifth Circuit.

and 9 J. Moore & B. Ward, Moore's Federal Practice ¶ 228.02 [2.-3] (1982).

It is also well established that this Court will not review a question not pressed or passed on by the courts below. See, e.g., Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n. 2 (1970); Husty v. United States, 282 U.S. 694, 702 (1931); Duignan v. United States, 274 U.S. 195, 200 (1927).

The issues which the State now seeks to present to this Court by way of certiorari were not properly presented to the courts below and, therefore, this Court should deny the petition for a writ of certiorari herein.

CONCLUSION

For the foregoing reasons, this Court should deny the State's Petition for a Writ of Certiorari.

This the 2d day of April, 1987.

Respectfully submitted,

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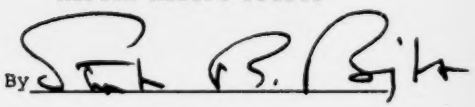
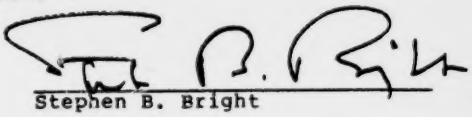
By 

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on Marvin L. White, Assistant Attorney General, Post Office Box 220, Jackson, Mississippi, 39205, counsel for the respondents, by mailing a copy to him at that address, first class postage prepaid, this 2d day of April, 1985.



Stephen B. Bright